BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the matter of the Appeal of:	Hearing Examiner File:
BAJA CONCRETE USA CORP., ROBERTO CONTRERAS, NEWWAY FORMING INC., and ANTONIO MACHADO	**No.: LS-21-002** **LS-21-003** **LS-21-004**
from a Final Order of the Decision issued by the Director, Seattle Office of Labor Standards	RESPONDENT CITY OF SEATTLE'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The undisputed facts in this case establish that between February 2018 and August 2020, Appellants Baja Concrete USA Corp; Newway Forming, Inc; and Antonio Machado violated Seattle's Wage Theft Ordinance, Minimum Wage Ordinance, and Paid Sick and Safe Time Ordinance in its employment of laborers and cement finishers in Seattle. The undisputed facts further establish that Appellants jointly employed the relevant workers as a matter of economic reality. Appellants cannot escape this reality—or evade liability for the rampant wage and hour violations that occurred—by using intermediaries to hire and pay workers or by attempting to shift responsibility to a transient and judgment-proof labor broker.

The Director of the Seattle Office of Labor Standards has considerable discretion in fashioning a remedy to redress such violations, including back wages, interest, liquidated damages,

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civil penalties, and fines. In this case, the remedy the Director assessed accorded with statutory requirements and settled legal principles and was a sound exercise of his discretion. Accordingly, the City is entitled to summary judgment as to Appellants' joint and several liability as well as the amounts owed in back wages, interest, liquidated damages, civil penalties, and fines.

II. STATEMENT OF FACTS

The undisputed material facts demonstrate that Appellants Baja Concrete USA ("Baja"), Newway Forming, Inc. ("Newway") and Antonio Machado ("Machado") exercised control over all aspects of the employer-employee relationship. The record also conclusively establishes that Appellants violated Seattle's Wage Theft Ordinance, Minimum Wage Ordinance, and Paid Sick and Safe Time Ordinance (collectively the "Ordinances") between February 2018 and August 2020. Based on these violations, the Office of Labor Standards ("OLS") issued a Findings, Determination, and Final Order ("Determination") assessing back wages, interest, liquidated damages, civil penalties and fines.

A. Newway, Baja, and Machado exercised extensive control over the conditions of Workers' employment.

Baja, a subcontractor of Newway, hired each of the workers listed on Attachment B to OLS' Determination (the "Workers") to perform work at a construction site located at 1120 Denny Way. Some Workers also performed work at two other sites within Seattle, 707 Terry Avenue and 2014 Fairview Avenue.[1]

Newway was a concrete high-rise subcontractor, and as such, it was tasked with handling the concrete work for high-rise construction at the three worksites where Workers worked.[2] As a subcontractor of Newway, Baja provided Workers for cement finishing, and Workers were

[1] Declaration of Cindi Williams, Exhibit A, 30(b)(6) Deposition of Kwynne Forler-Grant on behalf of Newway Forming, page 91, line 8 to page 93, line 25.
[2] *Id.*, page 90, line 24 to page 93, line 21.

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responsible for tasks such as patching and sanding the concrete and building forms for pouring the concrete.[3]

Roberto Soto Contreras, a labor broker working on behalf of Baja, recruited the Workers and provided some degree of day-to-day supervision. He regularly threatened to report the Workers to Immigration and Customs Enforcement ("ICE") should they step out of line.[4]

On the worksites, Newway directed Workers' work and controlled the conditions of their employment. Newway foremen supervised the Workers on the worksites,[5] and Machado, the Newway superintendent, functioned as the "boss"[6] and supervised the Newway foreman who also directed the Workers.[7] Newway foremen assigned tasks to Workers throughout the workday.[8] Newway also controlled Workers' daily schedules,[9] required Workers to attend regular safety meetings,[10] and played an indirect role in hiring and firing Workers.[11] Newway did not differentiate between its own Workers and Baja Workers in the direction it gave on the job site.[12]

Beginning in mid-2019, Newway began tracking Workers' start- and end-times at 1120 Denny Way by requiring Workers to sign in and out using Newway timesheets or time clocks.[13] Soto Contreras, on behalf of Baja, reviewed his own timesheets, as well as Newway's time clock information, with Newway and they would agree on an invoice amount to be paid to Baja for each

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[3] *Id.* at page 92, lines 2-18.
[4] Declaration of Laura Hurley, Exhibit A, English Translation of Declaration of Jonathan Parra Ponce, paragraph 13.
[5] Forler-Grant Deposition, page 79, lines 2-5.
[6] Declaration of Johnathan Parra Ponce, paragraphs 14, 15.
[7] Forler-Grant Deposition, page 80, lines 2-6.
[8] Declaration of Daron Williams, Exhibit A, Interview statement of Anthony Machado, page 2, lines 14-15; Cindi Williams Declaration, Exhibit B, Deposition of Anthony Machado, page 49, line 55 to page 53, line 5.
[9] Machado Deposition, page 46, lines13-19, page 54, lines 13-21.
[10] *Id.* at page 154, line 24 to page 155, line 14, Interview Statement of Anthony Machado, page 7, lines 11-13.
[11] Forler-Grant Deposition, page 53, lines 4-12.
[12] Machado Deposition, page 49, line 25 to page 50, line 11, page 52, lines 16-21, page 59, line 25 to page 60, line 15, page 62, lines 15-22, page 64, lines 2-3, page 66, lines 2-10, page 68, lines 13-19.
[13] *Id.* at page 85, lines 22-23; Forler-Grant Deposition, page 37, line 15 to page 38, line 5, page 54, lines 22-25.

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pay period.[14] Newway employees referred to their own records in helping Soto Contreras prepare these invoices[15] and in approving Baja's invoices for payment.[16]

Newway and Baja agreed on the hourly rate that Newway was to pay Baja for Workers' labor.[17] Workers were on Baja's payroll and received paystubs from Baja.[18]

B. The Office of Labor Standards' investigation, Determination, and calculation of remedies.

When OLS learned of potential violations of Seattle's labor standards involving Appellants and Workers, it opened an investigation. OLS ultimately issued a Determination, assessing back wages, interest, liquidated damages, civil penalties, and fines. This Section describe OLS' methodology in investigating alleged violations of Seattle's labor standards and determining the appropriate remedy.

1. Investigation and Determination

In January, 2020, OLS received information from a community-based organization about possible labor violations at a construction site in Seattle.[19] In January of 2020, OLS began investigating Newway's work at construction sites located at Denny Way, Terry Avenue, and Fairview Avenue.[20] Workers informed OLS that they often worked 50 to 75 hours per week with no overtime pay,[21] and they were not consistently provided with the required rest breaks or the required 30-minute meal breaks for every five hours of work.[22] Machado, a Newway site superintendent,

[14] Forler-Grant Deposition, page 58, line 22 to page 61, line7.
[15] *Id.* at page 59, lines18-24.
[16] *Id.* at page 61, lines 1-7.
[17] *Id.* at page 64, lines 15-17.
[18] Cindi Williams Declaration, Exhibit C, 30(b)(6) Deposition of Mercedes de Armas on behalf of Baja Concrete USA, page 18, line 20 to page 19, line 5; page 122, line2 to page 123, line 19.
[19] Cindi Williams Declaration, Exhibit D, Deposition of Daron Williams individually, page 18, lines 9-15.
[20] *Id.* at page 13, lines 7-15, page 16, lines 13-15.
[21] *Id.* at page 28, lines 17-21, page 28, line 24 to page 29, line 1.
[22] *Id.* at page 73, lines 6, 11-17; Cindi Williams Declaration, Exhibit E, 30(b)(6) Deposition of Katie Jo Keppinger on behalf of OLS, page 23, line 9 to page 24, line 5.

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informed OLS that workers for all trades stopped for two thirty-minute breaks, but under some circumstances, workers would have to work through the breaks.[23] OLS also learned that various deductions were taken from Workers' paychecks, including deductions for tools, rent, masks, and oil, without authorization.[24] OLS discovered that Workers were not informed of any paid sick leave policy; if a Worker needed to take sick time, the Worker would inform Soto Contreras that they were sick, but they would not receive any pay that day.[25]

Based on interviews with several Workers, OLS sent Appellants Notices of Investigation ("Notice" or "NOI") on May 22, 2020.[26] The Notices advised each party that OLS was investigating to determine whether there were violations of Seattle Labor Standards Ordinances.[27] Along with the Notices, OLS sent Requests for Information ("RFI").[28] The RFIs provided Appellants with an opportunity to answer questions and provide necessary information to aid in the investigation.[29] OLS requested paystubs, each employer's paid sick and safe time policy, meal and rest break information, rate of pay for overtime hours, and any other information that would assist OLS with its investigation.[30]

Over the next two months, OLS received some information from some of the Appellants, but OLS did not receive all of the information requested.[31] Since OLS did not receive all of the information it requested from each Appellant, OLS issued a subpoena *duces tecum* on July 16, 2020.[32]

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[23] Daron Williams Declaration, Exhibit A, Antonio Machado Interview Statement, page 3, lines 22-25; *see* Machado Deposition, page 161, line 25 to page 162, line 6.
[24] Daron Williams Individual Deposition, page 30, lines 19-21, Deposition Exhibit 1; page 31, lines 4-7; page 159, lines 8-11; page 160, line 20 to page 161, line 1.
[25] *Id.* at page 86, lines1-6, Deposition Exhibit 8; page 109, lines 18-23, referring to Deposition Exhibit 13.
[26] *Id.* at page 48, line 11 to page 50, line 3, Deposition Exhibit 2; page 52, lines14-17.
[27] *Id.*
[28] *Id.* at page 48, lines 11-12.
[29] *Id.* at page 49, lines 7-14, Deposition Exhibit 2.
[30] Daron Williams Declaration, ¶ 5.
[31] Daron Williams Individual Deposition, page 53, lines 2-14, page 54 line 3 to page 55, line 21, page 126, line 9 to page 127, line 10, Deposition Exhibit 16.
[32] *Id.* page 54, line 3 to page 55, line 21, page 126, line 9 to page 127, line10.

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Newway provided OLS timesheets submitted to Newway by Baja, but the timesheets did not show that Workers were provided with any meal or rest breaks.[33] These timesheets did confirm what OLS had learned from the Workers – that they worked six days a week and often worked 10 hours a day, and 50 to 60 hours a week.[34] OLS received *some* Workers' paystubs from Baja, but despite its many requests, either through the RFI, email communications, or through the subpoena *duces tecum*, OLS did not receive any of the following: any response from Soto Contreras, a complete set of paystubs for the past three years, written employment information for employees provided at the time of hire, notice or posters of any paid sick and safe time policy, written authorization forms for deductions, piece rate information, written change in pay rate information, Newway timecards,[35] or employee contact information.[36]

Paystubs submitted by Baja showed that Workers were paid every two weeks, and even if a Worker had worked well over 80 hours in a pay period, according to the corresponding timesheets, the paystub did not include the overtime hours or premium pay.[37] Paystubs showed that in March, 2020, after OLS began its investigation, Baja began including overtime pay rates and hours on paystubs.[38] Paystubs also showed hourly pay rates often changed or were missing entirely, and Baja did not provide any written notice to the Workers which explained the changes.[39] Baja admitted that pay amounts were set verbally by Soto Contreras and Baja did not maintain any written records of

[33] *Id.* page 126, line 24 to page 127, line 7; Forler-Grant Deposition, page 110, lines 2-23; Declaration of Daron Williams at ¶ 6.
[34] Cindi Williams Declaration, Exhibit F, 30(b)(6) Deposition of Daron Williams on behalf of OLS, page 65, lines 8-16, page 65, line 24 to page 66, line 3; Daron Williams Individual Deposition, page 28, line 17 to page 29, line 72.
[35] In this context, the term "timecards" refers to the records kept when using a time clock for tracking hours worked.
[36] Keppinger Deposition, page 44, lines 11-14, page 45, lines 24-25, page 59, lines 10-17, page 69, line 19 to page 70, line14.
[37] Cindi Williams Declaration, Exhibit G, Deposition of Mercedes de Armas Individually, page 82, line10 to page 83, line 21, Deposition Exhibit 6.
[38] Daron Williams Declaration, ¶ 10.
[39] de Armas Individual Deposition, page 114, line 21 to page 115, line 17; Daron Williams Individual Deposition, page 180, lines 2-10, page 209, line 23 to page 210, line 2.

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notification to Workers of changing pay rates.[40] Notations for "piece work" were also included on some paystubs, but no piece work rates or hours were noted.[41] Sick time "available" hours and "used" hours consistently totaled "0.00" on paystubs, and even if a paystub did include an amount for available sick leave hours, it was clear from the paystub that no hours were being accrued.[42] Through the investigation and through discovery, it was revealed that Baja identified a certain net amount to be paid to each Worker, then Baja manipulated various calculations (such as taxes and bonuses) to make the net pay equal to that net amount.[43] Paystubs showed the various deductions that were taken out of workers' pay but Baja never provided any written authorizations from Workers for those deductions.[44]

After reviewing all the information, OLS prepared a Determination, which it issued on August 5, 2021.[45] In its Determination, OLS concluded that Appellants, together with Soto Contreras, violated the following Ordinances:

1. SMC 14.20.020 for failing to pay an overtime premium rate for hours worked over 40 hours in a week;
2. SMC 14.19.030 for failing to pay the proper hourly minimum wage in 2019;
3. SMCs 14.20.020 and 14.20.030.A for failing to pay workers for all hours worked;
4. SMC 14.20.020 for failing to pay all compensation owed by imposing various deductions without prior written authorization;
5. SMC 14.20.020 for failing to provide the required meal and rest breaks based on hours worked in a day;
6. SMC 14.16.045.B for failing to provide the proper notice of rights poster for paid sick and safe time;
7. SMC 14.16.045.C for failing to provide workers with the written paid sick and safe time policy;
8. SMC 14.16.025 for failure to provide the proper paid sick and safe time accrual;
9. SMC 14.16.030.K for failure to provide written notification of updated amounts of

[40] de Armas Individual Deposition, page 115, line 15 to page 117, line 17; de Armas 30(b)(6) Deposition, page 126, lines11-19.
[41] Daron Williams Individual Deposition, page 180, lines 5-10; de Armas Individual Deposition, page 109, line18 to page 110, line 7; de Armas 30(b)(6) Deposition, page 58, lines 16-18, page 61, lines 6-9.
[42] de Armas Individual Deposition, page 94, line10 to page 100, line 17.
[43] *Id.* at page 35, line 10-19, page 35, line 22 to page 36, line 8, page 117, lines 1-4.
[44] *Id.* at page 131, lines 9-14.
[45] Keppinger Deposition, page 12, line 24 to page 13, line 1; Findings of Fact, Determination and Final Order of OLS dated August 5, 2021 (Determination), p. 36.

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accrued and used paid sick and safe time hours, each time wages were paid;
10. SMC 14.16.030.A for failing to allow workers to use paid sick and safe time;
11. SMCs 14.16.045.B, 14.19.045.B, and 14.20.045.B for failing to properly display an OLS poster, in English and in the workers' primary language;
12. SMCs 14.16.050, 14.19.050, and 14.20.030, for failing to retain all the necessary payroll records for three years after an employee works the hours;
13. SMC 14.20.025.D for failing to provide written notices of employment information at the time of hire or as soon as practicable or to any existing employees;
14. SMC 14.20.025.E for failing to provide written notice, each time wages were paid, of all hours worked, with overtime hours listed separately and by failing to list number of units completed for any piece work;
15. SMC 14.20.060.E for willfully hindering, preventing, impeding, or interfering with the Director in the performance of his duties by failing to provide to OLS employee contact information, interviews, and all the requested records, timesheets, paystubs, and timecards in a timely manner.[46]

2. Calculation of back wages, liquidated damages and penalties

A discussion about the calculation of back wages for the various violations as to each worker is relevant to the discussion about liability for the joint employers, which is further discussed in Section III, *infra*. Therefore, the methodology for calculating all back wages, liquidated damages, and penalties will be discussed in detail in this Section.

a. Calculation of back wages – unpaid overtime

Seattle Municipal Code 14.19.030 requires Schedule 1 employers to pay an applicable hourly minimum wage.[47] Schedule 1 employers are defined as "all employers that employ more than 500 employees…."[48] OLS concluded that Appellants were collectively Schedule 1 employers since Newway employs more than 500 employees.[49] The hourly minimum wage compensation requirements for Schedule 1 employers are as follows: $15.00 in 2018, $16.00 in 2019, and $16.39

[46] Findings and Determination at pp. 19-28.
[47] SMC 14.19.030.
[48] SMC 14.19.010.
[49] Findings and Determination at p. 20; Seattle Human Rights Rules 90-045(5): "The Schedule of the joint employer with the most employees determines the hourly rate for the employee who is jointly employed."

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in 2020.[50] Based on Appellants' failure to pay the overtime premiums in violation of SMC 14.20.020 and SMC 14.20.030.A, OLS calculated back wages by examining employees' 2018, 2019, and 2020 payroll reports, paystubs, and timesheets from the Baja and Newway work sites at 1120 Denny Way, 2014 Fairview Avenue, and 707 Terry Avenue.[51] From these records, OLS identified the weeks in which employees exceeded 40 hours of work to determine the number of overtime-eligible hours which had not been paid at time-and-a-half as indicated by their paystubs.[52] For each affected employee, OLS multiplied the employee's overtime-eligible hours by .5 to determine the amount still owed.[53] After multiplying the overtime eligible hours by .5, OLS multiplied that number by the employee's hourly pay rate, resulting in the amount of back wages still owed.[54] In some cases, records of workers' hourly rates were missing; in those instances, OLS calculated their average hourly rate first.[55] If the average hourly pay rate fell below the minimum wage and the employee qualified for overtime premium pay, OLS increased the hourly rate to the minimum wage for the corresponding year.[56]

b. Calculation of back wages – minimum wage violations

To determine whether Appellants paid employees the required minimum wage, OLS divided the gross wages from the paystub records by the total hours worked from the timesheets for that pay period.[57] If the wages fell below the minimum wage, OLS calculated the difference between what

[50] SMC 14.19.030.B.
[51] Keppinger Declaration, ¶ 6; Daron Williams Declaration, ¶ 10.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] Daron Williams Declaration, Exhibit B, Baja Calcs (version 3), OLS OT & WT Calcs, rows 3, 141, (listing two average hourly rates – one based on the average hourly rates of all workers for when there were no paystubs at all listed for that person (Row 3) and the other based on the average hourly rate for one worker if OLS had some paystubs for that worker but were missing some (Row 141)).
[56] Daron Williams Declaration, ¶ 10.
[57] *Id.* at ¶ 11; Keppinger Declaration, ¶ 9.

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the employee received in pay and what the employee should have received at the higher minimum wage rate and assessed interest based on the length of time that the wages had been overdue.[58]

c. Calculation of back wages – nonpayment for hours worked

OLS concluded that Appellants had violated SMC 14.20.020 and 14.20.030 by not paying workers for all hours worked.[59] In some pay periods, employees appeared on timesheets, but Appellants did not provide any corresponding paystubs.[60] For those employees, OLS computed back wages by multiplying the hours worked listed on the timesheets by an average hourly rate calculated by averaging all other workers' hourly rates.[61]

d. Calculation of back wages – unauthorized deductions

OLS determined that for the multiple deductions taken from employees' pay in violation of SMC 14.20.020, Baja failed to provide copies of any written authorizations from employees as required by RCW 49.52.060.[62] OLS calculated back wages based on the total amount withheld through deductions from each employee, and assessed interest based on the length of time elapsed since each deduction.[63] Workers who did not appear on timesheets at either of the three Seattle locations were excluded.[64]

e. Calculation of back wages – meal and rest break violations

OLS further determined that Appellants had violated SMC 14.20.020 by failing to pay all

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[58] *Id.*
[59] Findings and Determination, p. 21.
[60] Keppinger Deposition, page 19, line 24 to page 20, line 13.
[61] Daron Williams Declaration, ¶ 12.
[62] Daron Williams Individual Deposition, page 31, lines 4-9; *see* RCW 49.52.060 which explains that an employer may "withhold or divert any portion of an employee's wages when required or empowered so to do by state or federal law or when a deduction has been expressly authorized in writing in advance by the employee for a lawful purpose accruing to the benefit of such employee."
[63] Keppinger Declaration, ¶ 11.
[64] *Id.*

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compensation due to employees.[65] Compensation includes rest breaks.[66] According to the Washington Administrative Code ("WAC") sections 296-126-092(1) and 296-126-092(4), a ten-minute rest period is required for every four hours of working time and a 30-minute meal period is required when an employee works more than five hours in a shift.[67] OLS followed these guidelines in its determination.[68]

During the relevant time period, workers only received one rest break and one meal break per shift.[69] Notations indicating meal and rest breaks were missing from the timesheets provided by Appellants. To calculate back wages, OLS reviewed the timesheets and assessed 10 minutes of back wages for one missed rest break if an employee's shift exceeded five hours but was less than 10.[70] OLS assessed 10 minutes of back wages for one missed rest break and 30 minutes of back wages for one missed meal break if, according to the timesheets, a shift exceeded 10 hours but was less than 12.[71] OLS assessed 20 minutes of back wages for two missed rest breaks and 30 minutes of back wages for one missed meal break for shifts that were 12 hours or longer, and 15 hours or less.[72] OLS assessed 20 minutes of back wages for two missed rest breaks and one hour of back wages for two missed meal breaks if a shift was longer than 15 hours but less than 16 hours.[73] OLS assessed 30 minutes of back wages for three missed rest breaks, and one hour of back wages for two missed meal breaks for shifts between 16 and 19.99 hours.[74] OLS added the total missed breaks per worker, per

[65] Findings and Determination, p. 22.
[66] SMC 14.20.010.
[67] Washington Administrative Code sections 296-126-092(1), 296-126-092(4); Keppinger Deposition, page 23, line 9 to page 24, line 7.
[68] Keppinger Deposition, page 23, line 15 to page 24, line 7.
[69] *Id.* at page 23, lines 15-18.
[70] Keppinger Declaration, ¶ 13.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*

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year to calculate back wages.[75]

For those instances that involved missed meal breaks with overtime pay, OLS calculated back wages by computing the percentage of weeks within the year that each employee exceeded 40 hours and used that percentage to determine the portion of back wages for missed breaks that should be paid using the overtime premium.[76] Whenever an employee worked more than 40 hours in a week and was owed for missed breaks, those breaks were multiplied by time and a half because they were in addition to the 40 hours and because the employee had never received the straight time pay for the breaks.[77]

OLS assessed interest for all back wages for missed breaks in a given calendar year utilizing an individualized midpoint within the year for each employee.[78] The midpoint was calculated based on the first date and last date when the employee appeared in that year's timesheets and represents an estimated average date from which the missed break wages were due.[79] Interest was based on the time elapsed since the midpoint, at a rate of 1% per month up until to the date of the Determination.[80]

f. Calculation of back wages – paid sick and safe time

For the violations of SMC 14.16.030 which involved the accrual and use of paid sick and safe time, OLS calculated back wages as 30 paid sick and safe time hours for each year of noncompliance for up to three years preceding the initiation of the investigation through the date of the Determination, paid at the employee's rate of pay on the last day of each year of noncompliance, plus interest.[81] For employees working fewer than 2080 hours per year, the number of paid hours was prorated based on

[75] *Id.*
[76] *Id.* at ¶ 14.
[77] *Id.*
[78] *Id.* at ¶ 15.
[79] *Id.*
[80] *Id.*
[81] *Id.* at ¶ 16.

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hours worked.[82] Because of the workers' variable hourly compensation, OLS used an average hourly pay rate for each worker for each year.[83]

g. Total back wages, liquidated damages, fines, and penalties

Using the calculation methods described above, OLS assessed total back wages and interest due to the affected employees in the amount of $792,806.92, which includes $631,288.54 in back wages plus 12% annual interest, calculated monthly.[84] Under the Wage Theft, Minimum Wage, and Paid Sick and Safe Time Ordinances, OLS may assess liquidated damages in an additional amount of up to twice the unpaid compensation.[85] In this case, OLS assessed $1,262,577.19 in liquidated damages.[86]

Under the Wage Theft Ordinance, OLS may assess a civil penalty of up to $556.30 per aggrieved party for a first violation.[87] In this case, OLS assessed $556.30 for each of the 52 aggrieved parties for a first violation of the Wage Theft Ordinance for a total civil penalty of $28,927.60.[88]

Also, under the Minimum Wage Ordinance, OLS may assess a civil penalty of the methods described above, OLS assessed $556.30 for each of the five aggrieved parties for a first violation of the Minimum Wage Ordinance for a total civil penalty of $2,781.50.[89]

Under the Paid Sick and Safe Time Ordinance, OLS may assess a civil penalty of up to $556.30 per aggrieved party for a first violation.[90] In this case, OLS assessed $556.30 for each of the 38 aggrieved parties for a first violation of the Paid Sick and Safe Time Ordinance for a total civil

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[82] *Id.*
[83] *Id.*
[84] *Id.* at ¶ 17.
[85] SMC 14.16.080.B; SMC 14.19.080.B; SMC 14.20.060.B.
[86] Keppinger Declaration, ¶ 18.
[87] SMC 14.20.060.F.
[88] Keppinger Declaration, ¶ 19.
[89] *Id.* at ¶ 20.
[90] SMC 14.16.080.F.

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penalty of $21,139.40.[91]

An employer who "willfully hinders, prevents, impedes, or interferes with the Director or Hearing Examiner in the performance of their duties under this Chapter 14.20 shall be subject to a civil penalty of not less than $1,000 and not more than $5,000."[92] Based on Appellant's failure to provide OLS with employee contact information, and their failure to provide all paystubs, timesheets, and timecards, and the unreasonable delays in responding to OLS' requests for information, OLS assessed $5,565.10 for willful interference, the maximum amount adjusted for inflation.[93]

OLS assessed fines totaling $115,712.50 under the Paid Sick and Safe Time Ordinance and the Wage Theft Ordinance. Under the Paid Sick and Safe Time Ordinance, the Director assessed the following fines: $556.30 for a violation of the notice of rights/workplace poster; $556.30 for 38 aggrieved parties for failing to maintain records; $556.30 for a violation of the notification of balance; and $556.30 for a violation of the written paid sick and safe time policy.[94] Under the Wage Theft Ordinance, the Director assessed the following fines: $556.30 per affected employee for failing to provide notice of employment information; $556.30 for 52 aggrieved parties for failing to maintain records; $556.30 for violation of the notice of rights/workplace poster; and $556.30 for 52 aggrieved parties for a violation of the notice of payday information.[95]

In ordering that these liquidated damages, fines, and penalties were due, the Director's designee considered a variety of factors. First, the Director's designee[96] considered the circumstances of this case and found that the facts of this case justified the amounts assessed.[97] This consideration

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[91] Keppinger Declaration, ¶ 21.
[92] SMC 14.20.060(E).
[93] Keppinger Declaration, ¶ 22.
[94] *Id.* at ¶ 23.
[95] *Id.* at ¶ 24.
[96] The Ordinances permit the Director to designate a person to act in his stead. *See* SMC 14.19.010 ("'Director' means The Director of the Office of Labor Standards or the Director's designee"); *see also* SMC 14.20.010 ("'Director' includes "Director's designee").
[97] Keppinger Deposition, page 28, line 21 to page 30, line 11, page 67, line 13 to page 68, line 7.

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included the facts and circumstances described in the following paragraphs.

Second, the Director's designee considered Appellants' culpability in the multiple violations OLS found.[98] Because Appellants failed to provide records that are required to be kept by employers, failed to submit to interviews, failed to provide employee contact information, failed to provide proper meal and rest breaks, took unauthorized deductions from workers' pay, and did not pay employees any overtime premiums, the Director's designee found the amounts assessed justified.[99]

Third, the Director's designee considered the substantive nature of the violations.[100] Because the employers underpaid employees by thousands of dollars in overtime pay, paid sick and safe time, unauthorized deductions, and missed meal and rest breaks, over the course of multiple years, the Director's designee found the amounts assessed justified.[101]

Fourth, the Director's designee considered the size, revenue, and human resources capacity of the employers.[102] Because the employers are large, with more than 500 employees with multiple construction projects in Seattle and Bellevue, the Director's designee found the amounts assessed justified.[103]

Fifth, the Director's designee considered amounts assessed in similar cases.[104] Because the assessments here are in line with OLS' general approach to Determinations issued to large employers with multiple violations which include willful interference, the Director's designee found the amounts assessed justified.[105]

Finally, the Director's designee considered the total amount of unpaid compensation,

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[98] *Id.* at page 67, lines 13-17.
[99] *Id*. at page 28, line 21 to page 30, line 11.
[100] *Id.* at page 67, lines 8-20.
[101] *Id*. at page. 28, line 21 to page 30, line 11, referencing the Determination.
[102] *Id.* at page 67, line 21 to page 68, line 4.
[103] Keppinger Declaration, ¶ 28.
[104] Keppinger Deposition, page 68, lines 5-7; Keppinger Declaration, ¶ 29.
[105] Keppinger Declaration, ¶ 29.

Ann Davison
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(206) 684-8200

liquidated damages, penalties, fines, and interest due.[106] Based on the factors identified in the preceding paragraphs, the Director's designee found the amounts assessed justified.[107]

III. ARGUMENT

It is beyond dispute that Appellants violated the Minimum Wage Ordinance, the Wage Theft Ordinance, and the Paid Sick and Safe Time Ordinance. The undisputed evidence also establishes that Appellants jointly employed the Workers. To remedy these violations, the Director properly exercised his discretion and acted in accordance with the Ordinances regarding the amount of back pay owed to workers, the amounts of liquidated damages, penalties, and fines as to all of the Appellants in this case. Thus, the Hearing Examiner should uphold the Determination and convert it to a final order.

A. Summary Judgment Standard

Dispositive motions are contemplated by both the Hearing Examiner's Rules and the prehearing order in this case.[108] "Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law."[109] The court should "consider all the facts and make all reasonable factual inferences in the light most favorable to the nonmoving party."[110] "In the joint employment context, summary judgment may be available even if the joint employment factors are split between finding and not finding the relationship exists."[111]

B. Appellants violated the Ordinances.

The undisputed material facts conclusively establish that Appellants violated each of the Ordinances. As an initial matter, according to the Ordinances, if an employer fails to retain adequate

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[106] *Id. at* ¶ 30.
[107] *Id*.
[108] Hearing Examiner Rules in Discrimination Cases ("HER") 2.07(e); Hearing Examiner Case #LS-21-002, LS-21-003, LS-21-004, Prehearing Order, September 24, 2021.
[109] *Lockner v. Pierce Cty.*, 190 Wn.2d 526, 530 (2018) (citing Civil Rule 56).
[110] *Lockner*, 190 Wn.2d at 530 (citing *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989)).
[111] *Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 194, 332 P.3d 415 (2014).

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(206) 684-8200

records as required, "there shall be a presumption, rebuttable by clear and convincing evidence" that the employer violated the Ordinances "for the periods and for each employee for whom records were not retained."[112] Given the failure of Appellants to produce timecards, written authorizations for deductions, written paid sick and safe time policies, notification of paid sick and safe time accrual and use, all paystubs, records documenting overtime pay, piece work rates or units, and written notice of employment information, OLS correctly presumed that those records do not exist.[113] In addition, Mercedes De Armas, Baja's representative during the investigation, indicated that when she was working with Baja to provide documents to OLS, records were not provided because she did not have them.[114]

Baja's representative for the purpose of the OLS investigation,[115] as well as the 30(b)(6) deposition in this case, admitted that if she did not send documents to OLS then it was because Baja didn't have them.[116] She also admitted that there was no documentation of each Worker's pay rate in the paystubs,[117] no documentation of overtime,[118] and that pay stubs do not accurately show hours worked.[119] Baja provided the "summaries" that were in the possession of Roberto Contreras,[120] but those summaries were not sufficient for compliance with the Ordinances.[121]

The dearth of employee records as to hours, pay rates, PSST, meal and rest breaks, supports each of OLS's findings made jointly against all Appellants. There were no records of overtime hours

[112] SMC 14.16.050.B; SMC 14.19.050.B; SMC 14.20.030.B.
[113] On May, 27 and June 3, 2022, Baja provided additional paystubs to the City through discovery. *See* Declaration of Lorna S. Sylvester, ¶ 2. Appellants "may not use such records in any appeal to challenge the correctness of any determination by the Agency of damages owed or penalties assessed." SMC 14.16.070.F; SMC 14.19.070.F; SMC 14.20.050.F.
[114] de Armas Individual Deposition, page 54, lines 13-17, page 66, lines 10-20, page 91, line 16 to page 92, line 4.
[115] de Armas Individual Deposition, page 92, lines 2-4.
[116] *Id.*, page 113, line 25 to page 114, line 20, page 137, lines 9-22.
[117] de Armas Individual Deposition, page 145, line 16 to page 146, page 13.
[118] *Id.*, page 134, lines 3-24.
[119] de Armas 30(b)(6) Deposition, page 61, lines 6-12.
[120] de Armas Individual Deposition, page 130, line 17 to page 131, line 8, page 133, line 13 to page 134, line 13.
[121] *Id.*, page 136, line 10 to page 137, line 22.

Ann Davison
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or pay, workers reported working over 40 hours per week, and Appellants presented no evidence to refute such a finding. The timesheets provided by Newway show many pay periods where workers worked over forty hours in a week, there is no issue of material fact that Appellants violated SMC 14.20.020 for failing to pay an overtime premium rate for hours worked over 40 hours in a week.

The records provided by Newway showed Workers consistently worked over 40 hours per week.[122] The records provided by Baja showed no documentation of overtime hours or of overtime pay,[123] rather they just showed the amount paid to the worker with no breakdown in the overtime hours worked or overtime rate of pay.[124] The goal of the Baja paystubs was to arrive at a particular total rather than to document hours, overtime or any other required documentation.[125] Not only does the absence of adequate overtime and hours worked records show that there is no issue of material fact regarding the nonpayment of straight time and overtime, but it is also an independent violation of SMCs 14.16.050, 14.19.050, and 14.20.030, for failing to retain all the necessary payroll records for three years after an employee works the hours. Therefore, assessment of back wages, liquidated damages, interest and civil penalties was appropriate.[126]

It is undisputed that Workers were not offered any paid sick and safe time, nor were they provided the requisite information about paid sick and safe time.[127] Documents provided by Baja did not have the required documentation of paid sick and safe time accruals or use,[128] so there was not only nothing to refute the Workers' claims, but Baja and Newway's recordkeeping also violated the pay stub notice requirements of the PSST Ordinance.[129] That requirement mandates that employers

[122] Forler-Grant Deposition, page 67, lines 5-7; Daron Williams Declaration, ¶¶ 7, 19.
[123] Daron Williams Declaration, ¶¶ 7-9.
[124] de Armas 30(b)(6) Deposition, page 50, line 15 to page 53, line 7, page 57, line 22 to page 61, line 22.
[125] *Id*.
[126] SMC 14.20.060.
[127] Daron Williams Declaration, ¶ 13, Jonathan Parra Ponce Declaration, ¶ 7.
[128] Daron Williams Declaration, ¶ 13.
[129] SMC 14.16.030.K.

Ann Davison
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provide notice of accrued PSST and paid PSST, which was missing in documentation provided by Appellants. The is no issue of material fact that the Appellants violated the PSST accrual requirement, the requirement that PSST accrual and use be updated in each pay stub, and the requirement that employers allow workers to use their PSST.[130] Accordingly, back wages were owed for those violations, and interest, liquidated damages, and civil penalties can be assessed as well.[131]

For some workers, the records provided by Appellants showed that workers were paid less than the required minimum wage in 2019. In cases where OLS identified that workers were paid below minimum wage, OLS divided the gross wages from the paystub records by the total hours worked from the timesheets for that pay period.[132] If the wages fell below the minimum wage, OLS calculated the difference between what the employee received in pay and what the employee should have received at the higher minimum wage rate and assessed interest based on the length of time that the wages had been overdue.[133] There is no issue of material fact that the Appellants violated SMC 14.19.030 for failing to pay the proper hourly minimum wage in 2019.

The record also reveals that Appellants failed to provide the meal and rest breaks to which employees were entitled, and that they were subject to unlawful deductions from their wages as described in section B.2. above. Workers told OLS that they received a single meal break and rest break, and their breaks did not satisfy the law based on the number of hours they frequently worked.

In addition, Baja was unable to show that any notice was given to any worker about their rights. There is no issue of material fact as to a violation of SMC 14.16.045.B for failing to provide the proper notice of rights poster for paid sick and safe time, as well as violations of SMCs 14.19.045.B, and 14.20.045.B for failing to properly display an OLS poster, in English and in the

[130] SMC 14.16.925, 14.16.030.K, 14.16.030.A.
[131] SMC 14.16.080.
[132] Daron Williams Declaration, ¶ 11; Keppinger Declaration ¶ 9.
[133] *Id.*

Ann Davison
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(206) 684-8200

workers' primary language. No written notice of employment information was given to Workers at the time of hire regarding their wages,[134] which is an independent violation of SMC 14.20.025.D.

Appellants have provided no information, either during OLS' investigation or during discovery, to negate the conclusion that Appellants violated the Ordinances in the manner described in the Determination. In other words, **"**reasonable minds could reach only one conclusion from the evidence presented."[135]

C. Appellants jointly employed the Workers.

For purposes of Seattle's Minimum Wage, Wage Theft, and PSST Ordinances, the term "Employer" refers to "any individual, partnership, association, corporation, business trust, or any entity, person or group of persons, or a successor thereof, that employs another person and includes any such entity or person acting directly or indirectly in the interest of an employer in relation to an employee."[136]

The Ordinances are remedial in nature and subject to liberal construction to effect their purpose in protecting workers.[137] Like the Fair Labor Standards Act ("FLSA"), the Ordinances broadly define the term "Employ" as "to suffer or permit to work."[138] Because these enactments use the same, expansive language as the FLSA to define employment, it is appropriate to look to FLSA jurisprudence in interpreting the Ordinances.[139] In the FLSA context, "[a]n entity 'suffers or permits' an individual to work if, as a matter of economic reality, the individual is dependent on the entity."[140]

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[134] de Armas 30(b)(6) Deposition, page 53, line 12 to page 54, line 7.
[135] *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007) (citations omitted).
[136] SMC 14.16.010. 14.19.010, 14.20.010.
[137] *See Peninsula School District No. 401 v. Public School Employees of Peninsula*, 130 Wn.2d 401, 407, 924 P.2d 12 (1996); *see also U.S. for Benefit and on Behalf of Sherman v. Carter*, 353 U.S. 210, 216, 77 S.Ct. 793, 1L.Ed.2d 776 (1957).
[138] SMC 14.16.010. 14.19.010, 14.20.010; *see* 29 U.S.C. § 203(g) (FLSA).
[139] *Cf. Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 195, 332 P.3d 415 (2014) (looking to FLSA's "suffer or permit" standard in considering joint employment under Washington's Minimum Wage Act).
[140] *Antenor v. D & S Farms*, 88 F.3d 925, 929 (11th Cir. 1996) (citing *Goldberg v. Whitaker House Cooperative, Inc*., 366 U.S. 28, 33 (1961)).

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"[T]he 'suffer or permit to work' standard was developed to assign responsibility to businesses that did not directly supervise putative employees."[141] This "definition of 'employ' is far broader than that in common law and encompasses working relationships, which prior to [the FLSA], were not deemed to fall within an employer-employee category."[142]

In addition to broadly defining employment, the Ordinances explicitly contemplate joint employment. Under the Ordinances, "[m]ore than one entity may be the 'employer' if employment by one employer is not completely disassociated from employment by the other employer."[143] In administering Seattle's minimum wage and minimum compensation rates, OLS holds joint employers jointly and severally liable for violations. "If the facts establish that the employee is jointly employed by two or more employers, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the ordinance with respect to the entire employment for the particular work week and pay period."[144]

To determine whether multiple entities function as joint employers, OLS employs the "economic realities" test the Washington Supreme Court announced in *Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186.[145] In *Becerra*, the Washington Supreme Court considered whether employers were jointly liable for violations of Washington's Minimum Wage Act. In making this determination, the high court adopted the "economic reality" framework for joint employment the Ninth Circuit had announced in *Torres-Lopez v. May.*[146] There, the Ninth Circuit set forth thirteen nonexclusive factors to determine whether an entity functioned as a joint employer, including both "formal or regulatory

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[141] *Id.* at 933.
[142] *Becerra*, 181 Wn.2d at 195 (internal quotation marks omitted, alteration in original).
[143] SMC 14.16.010. 14.19.010, 14.20.010.
[144] Seattle Human Rights Rule 90-045(6).
[145] Seattle's Minimum Wage Ordinance, Questions and Answers. Available at QA_MW_22_0127.pdf (seattle.gov) (last visited June 13, 2022); *see also* SHRR 90-045(3) (indicating that joint employment requires a totality-of-circumstances analysis).
[146] *Becerra v. Expert Janitorial, LLC.*, 181 Wn.2d 186 (2014) (citing *Torres-Lopez*, 111 F.3d 633 (9th Cir. 1997).

Ann Davison
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factors" and "common law" or "functional" factors.[147] The five regulatory factors the *Torres-Lopez* court identified are:

> (A) The nature and degree of control of the workers;
>
> (B) The degree of supervision, direct or indirect, of the work;
>
> (C) The power to determine the pay rates or the methods of payment of the workers;
>
> (D) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; [and]
>
> (E) Preparation of payroll and the payment of wages.

The eight functional, common-law, or non-regulatory factors are:

> (1) whether the work was a specialty job on the production line,
>
> (2) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes,
>
> (3) whether the "premises and equipment" of the employer are used for the work,
>
> (4) whether the employees had a business organization that could or did shift as a unit from one [worksite] to another,
>
> (5) whether the work was piecework and not work that required initiative, judgment or foresight,
>
> (6) whether the employee had an "opportunity for profit or loss depending upon [the alleged employee's] managerial skill,
>
> (7) whether there was permanence [in] the working relationship, and
>
> (8) whether the service rendered is an integral part of the alleged employer's business,[148]

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[147] *Becerra*, 181 Wn.2d at 196 (citing *Torres-Lopez*, 111 F.3d at 639-40).

[148] *Torres-Lopez*, 111 F.3d at 639-40 (internal quotation marks and citations omitted; alterations in original).

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In *Becerra*, the Washington Supreme Court emphasized that "[t]hese factors are not exclusive and are not to be applied mechanically or in a particular order."[149] Rather, a court considering joint employment must examine the totality of the circumstances. "[T]he determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity."[150] In addition to the factors articulated in *Torres-Lopez*, a tribunal "is also free to consider any other factors it deems relevant to its assessment of the economic realities."[151] Such factors may include "whether the putative joint employer knew of the wage and hour violation, whether it paid sufficient amounts to the subcontractors to allow for a lawful wage, and whether the subcontracting arrangement is a subterfuge or sham."[152]

1. As a matter of law, Newway jointly employed the Workers.

Taken as a whole, the undisputed evidence indicates that Newway exercised control over the Workers and that the Workers were economically dependent on Newway, which means that they were jointly employed by Newway.[153] This section will describe how the various factors of joint employment were satisfied by Newway's relationship with the workers. Newway directed the work at the relevant worksites, and Newway employees supervised the Workers, both directly and indirectly. Newway exercised further control over the Workers by playing a role in Worker compensation, hiring, and firing. Workers performed work with the aid of Newway's premises and equipment, evincing Workers' economic dependence on Newway. Workers were also economically dependent on Newway in that the work they performed was inextricably linked to Newway's

[149] 181 Wn.2d at 198.
[150] *Id*. (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)); *see also Becerra*, 181 Wn.2d at 198 ("[T]he economic reality test 'offers a way to think about the subject and not an algorithm. That's why toting up a score is not enough.") (quoting *Reyes v. Remington Hybrid Seed Co*., 495 F.3d 403, 408 (7th Cir. 2007)).
[151] *Becerra*, 181 Wn.2d at 198 (quoting *Ling Nan Zheng v. Liberty Apparel Co*., 355 F.3d 61, 71-72 (2d Cir. 2003))
[152] 181 Wn.2d at 198 (internal quotations omitted).
[153] *Torres-Lopez*, 111 F.3d at 644.

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performance of its contractual duties and provided no opportunities for profit or loss based on Workers' own managerial skill. And rather than functioning as a freestanding unit that shifted as such from one worksite to another, Baja was, for all intents and purposes, a creature of Newway, that was formulated for the purpose of providing labor to Newway and contracted with no other entities in the United States. Because Newway jointly employed the Workers as a matter of economic reality, this tribunal should conclude as a matter of law that Newway was a joint employer of the Workers for the purposes of the Ordinances.

a. Newway controlled the conditions of workers' employment.

Courts consider "[t]he nature and degree of control of the workers" as one of the regulatory factors to consider in determining joint employment.[154] Newway cannot plausibly dispute that it exerted significant control over Workers' day-to-day working conditions. Although the general contractor on the 1120 Denny Way worksite, Onni, determined the scope of work, Newway had discretion in determining the order in which to accomplish the required tasks, and it imposed those decisions on its subcontractors.[155]

Antonio Machado, the site superintendent at 1120 Denny Way, was responsible for supervising each of the foremen, whom Newway sometimes termed "leads."[156] Once a week, Machado would meet with all trades to put together a work schedule for the week.[157] Every day, he would assign tasks to his foremen, who in turn would pass on those instructions to the Workers.[158]

Newway's foremen oversaw workers directly employed by Newway's subcontractors, including Baja.[159] Newway foremen instructed the Workers, via Soto Contreras, on where they

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[154] *See Torres-Lopez*, 111 F.3d at 639
[155] Forler-Grant Deposition, page 122, lines 1-10.
[156] Forler-Grant Deposition, page 80, lines 2-6.
[157] Cindi Williams Declaration, Exhibit B, Deposition of Anthony Machado, page 21, line 21 to page 22, line 2.
[158] *Id.*, page 23, lines 22-24, page 42, lines 17-23.
[159] Forler-Grant Deposition, page 79, lines 2-5; Machado Deposition, page 49, line 25 to page 50, line 4, page 51, line 20 to page 52, line 10; Parra Ponce Declaration, ¶ 15.

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should be stationed throughout the workday.[160] They also micromanaged Workers' day-to-day work. Workers would approach Newway foreman for instructions, and after a Worker finished a task, Newway foremen would tell him what to do next.[161] In fact, Newway foremen treated Workers as their own; after Machado would give his foremen a task, it was up to the foremen to decide whether to enlist workers on Baja's payroll or Newway's payroll.[162] As Machado explained, if his foremen "need something done, they will mix, you know, guys with a Baja with our guys; right? So to make sure they get them done. I mean we wouldn't separate… Baja guys in …one side and our employees on the other. No. They were working together."[163]

When Newway had concerns about the accuracy of Baja's billing, it independently implemented a time clock system instead of requiring Baja to do so.[164] In other words, instead of demanding better accuracy from its subcontractor due to a potential breach of a contract, Newway simply inserted itself into this supervisory function and performed the function itself.

Newway also controlled the Workers' daily schedules. Where a putative joint employer "controlled the overall harvest schedule and the number of workers needed for harvesting" as well as "which days were suitable for harvesting," this is evidence of joint employment.[165] Machado would direct his foremen as to when crews needed to begin work and when they needed to stay after hours.[166] Newway foremen would tell Workers when it was time to go home for the day.[167] Workers on Baja's payroll generally took breaks and paused for lunch at the same time as workers on Newway's

[160] Forler-Grant Deposition, page 80, lines 14-17, *see also* page 13, lines 10-19.
[161] Daron Williams Declaration, Exhibit A, Interview Statement of Anthony Machado, page 3, lines 6-7, 19-20.
[162] Machado Deposition, page 52, lines 13-21.
[163] *Id.*, page 60, lines 8-15.
[164] Forler-Grant Deposition, page 37, line 25 to page 38, line 5.
[165] *Torres-Lopez*, 111 F.3d at 642
[166] Machado Deposition, page 46, lines 13-19, page 54, lines13-21; *see also* Machado Interview Statement, page 3, lines 6-7, page 4, lines13-15.
[167] Machado Interview Statement, page 7, lines 11-13.

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payroll.[168] Similarly, Workers worked the same hours as their counterparts on Newway's payroll, further evincing Newway's control of work schedules.[169] While there is some dispute as to whether the Workers were required to *accept* Newway's offers for additional hours beyond the standard eight-hour workday, there can be no dispute that Newway controlled the number of hours *available* to Workers.[170] "[E]ven when one entity exerts 'ultimate' control over a worker, that does not preclude a finding that another entity exerts sufficient control to qualify as a joint employer under the FLSA."[171]

Newway exerted further control over the Workers by threatening them. Machado would frequently threaten to report Workers to Immigration and Customs Enforcement (ICE).[172] If Workers were sick, Machado, through Soto Contreras would "threaten [Workers'] immigration status and say he would work to make sure [they] wouldn't get jobs anywhere else if [they] called in sick again."

b. Newway closely supervised workers' performance, both directly and indirectly.

The degree to which Newway personnel supervised Workers weighs heavily in favor of joint employment. Courts consider "[t]he degree of supervision, direct or indirect, of the work" as a factor bearing on joint employment.[173] Newway's Machado was almost always present at the construction site[174] and was continuously monitoring workers' performance.[175] If he came across a problem, he would address it with the foreman, regardless of whether the offending workers were on Newway's or Baja's payroll.[176] As he explained, "My foremans [sic] they were supervising Bajas, the laborers

[168] Forler-Grant Deposition, page 26, lines 1-3, Machado Deposition, page 54, line 22 to page 55, line 5; Machado Interview Statement, page 3, lines 23-24.
[169] Parra Ponce Declaration, ¶ 19.
[170] Forler-Grant Deposition, page 68, line 16 to page 69, line 12.
[171] *Barfield v. New York City Health and Hospitals Corp.,* 537 F.3d 132, 148 (2d Cir. 2008).
[172] Parra Ponce Declaration, ¶ 13.
[173] *See Torres-Lopez,* 111 F.3d at 640.
[174] Machado Deposition, page 24, lines 18-21.
[175] *Id.*, page 23, lines 2-16, page 25, lines 15-18, page 29, lines 9-11.
[176] *Id.*, page 67, line 12 to page 68, line 19.

Ann Davison
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and the cement finishers; right? So, I mean, if there is an issue there, I don't care if they are Baja or Newway. I got to do whatever it takes, you know, to make everybody look good, right?"[177] A court may find joint employment where a putative joint employer supervises workers on a daily basis, is in physical proximity, and provides direction and feedback.[178] Joint employment may also be found where a putative joint employer "exercised a substantial degree of supervision over the work performed by the farmworkers" where, as here, one of its officials "had the right to inspect all the work performed by the farmworkers" and "[h]is daily presence in the fields helped to ensure that the farmworkers performed satisfactorily."[179]

Newway also required Workers to attend regular safety meetings.[180] Workers were told to list Newway as their employer on the sign-in sheet for these mandatory meetings.[181] A Newway employee, whose first name was Conor, was responsible for safety sitewide,[182] and Machado monitored Workers' safety practices on a day-to-day basis, bringing in Conor when necessary to correct an issue. A finding of joint employment is supported if a putative joint employer requires workers to attend frequent meetings and hold themselves out as that employer's employee.[183]

As noted, Newway foremen routinely supervised Workers.[184] Although the parties dispute whether Newway foreman interacted directly with Workers or always used Soto Contreras as an intermediary, "[i]t is well settled that supervision is present whether orders are communicated directly

[177] *Id.*, page 68, lines 13-19.
[178] *Salinas*, 848 F.3d at 146.
[179] *Torres-Lopez*, 111 F.3d at 642.
[180] Forler-Grant Deposition, page 79, lines 15-23, Machado Deposition, page 154, line 24 to page 155, line 14, Parra Ponce Declaration, ¶ 18.
[181] Parra Ponce Declaration, ¶ 18, Forler-Grant Deposition, page 30, line 23 to page 32, line 24.
[182] Machado Deposition, page 21, lines 12-18, page 27, lines 14-19.
[183] *See Salinas*, 848 F.3d at 146-47.
[184] Forler-Grant Deposition, page 79, lines 2-5; *See also* Machado Deposition, page 49, line 25 to page 50, line 4, page 51, line 20 to page 52, line 10; Parra Ponce Declaration, ¶ 15.

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to the laborer or indirectly through the contractor."[185] For example, in *Hodgson v. Griffin & Brand of McAllen, Inc*., the Fifth Circuit opined, "[t]he fact that [the grower] effected the supervision by speaking to crew leaders, who in turn spoke to the harvest workers, rather than speaking directly to the harvest workers does not negate a degree of apparent on-the-job control over the harvest workers."[186]

Moreover, it is clear from the record that while Soto Contreras nominally supervised workers, he had minimal—if any—actual authority with respect to the Workers' day-to-day responsibilities and functioned as nothing more than, at most, a middleman. Soto Contreras always took orders from Newway personnel.[187] When Newway's Tom Grant needed something, he would call Soto Contreras.[188] When Soto Contreras required Workers to attend Newway's weekly safety meetings, he did so at the direction of Newway. Newway acknowledged that its foremen would tell Soto Contreras where the Workers were to be stationed throughout the day, and Soto Contreras would impart this information to the Workers.[189]

In *Chao v. Westside Drywall, Inc*., a court concluded that the "supervision and control" factor counseled in favor of joint employment under circumstances involving substantially less supervision and control than is present here.[190] In *Chao*, there was "no evidence that [the putative joint employer] told the laborers when to report to work, when to take breaks, when their workday ended, what days to work, or whether they were free to attend to personal business during the day."[191] And while supervisors associated with the putative joint employer "regularly visited the project sites to provide

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[185] *Salinas v. Commercial Interiors, Inc*., 848 F.3d 125, 148 (2017) (quoting *Aimable v. Long & Scott Farms*, 20 F.3d 434, 441 (11th Cir. 1994).
[186] *Hodgson v. Griffin & Brand of McAllen, Inc*., 471 F.2d 235, 238 (5th Cir. 1973).
[187] Parra Ponce Declaration, ¶ 16.
[188] Machado Deposition, page 38, lines 1-2.
[189] Forler-Grant Deposition, page 80, lines 14-17.
[190] *Chao v. Westside Drywall, Inc*., 709 F.Supp.2d 1037 (D. Or. 2010).
[191] *Id.*, at 1062.

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supervision and instruction…these visits were brief, lasting only 10 or 20 minutes, and were not daily occurrences."[192] If the facts in *Chao* supported joint employment, the degree of control and supervision in this case easily clears this hurdle.

c. Newway had on influence on Worker pay.

Although Newway did not issue Workers' paychecks, it had a hand in Worker pay nonetheless.[193] It is undisputed that beginning in mid-2019, Newway required Workers to enter the Newway office at the beginning and end of every workday to record their start- and end-times.[194] Baja used Newway's time clock to check the accuracy of its workers' time.[195] It is undisputed that Newway collected and maintained records establishing the number of hours Workers worked.[196] and that it looked to these records in helping Soto Contreras prepare invoices[197] and Newway approving those invoices.[198]

In *Salinas v. Commercial Interiors, Inc.,* the Fourth Circuit held that a general contractor and subcontractor jointly employed drywall installers where, as here, the subcontractor issued workers' paychecks but the general contractor "recorded Plaintiffs' hours on timesheets, maintained those timesheets, and required Plaintiffs to sign in and out each day."[199] And in *Barfield v. New York City Health and Hospitals Corp.,* the Second Circuit found that a putative joint employer's practice of merely maintaining records of hours worked counseled in favor of joint employment, notwithstanding

[192] *Id; see also Barfield*, 537 F.3d at 147 (recognizing that "the law does not require an employer to look over his workers' shoulders every day in order to exercise control") (internal quotations omitted).
[193] *See Torres-Lopez*, 111 F.3d at 640 (identifying "[t]he power to determine the pay rates or the methods of payment of the workers" and "[p]reparation of payroll and the payment of wages" as regulatory factors).
[194] Forler-Grant Deposition, page 37, line 22 to page 38, line 5, page 106, line 11 to page 107, line 15, referencing Deposition Exhibit 13.
[195] *Id.,* page 60, line 1-5.
[196] Forler-Grant Deposition, page 57, lines 18-20.
[197] *Id,* page 59, lines 18-24.
[198] *Id.,* page 18, line 16 to page 19, line 4, page 35, line 19 to page 36, line 5, page 61, lines 1-7.
[199] 848 F.3d 125, 147 (4th Cir. 2017); *see also Chao*, 709 F.Supp.2d at 1063 (requirement that putative joint employer required laborers to track their time on time sheet worksheets and turn them in weighed in favor of joint employment).

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the putative joint employer's "apparent failure to organize these records in a way that readily alerted it to when an employee…worked more than 40 hours in a given week."[200]

Furthermore, there is no dispute that Newway personnel signed off on Baja invoices, thereby approving the number of hours for which Baja billed. Such approval was the subject of regular meetings between Newway and Baja.[201] In addition, Newway unilaterally established the hourly rate that it paid Baja for Workers' labor.[202] Taken together, these actions "effectively set a cap on" Worker pay and thus counsel in favor of joint employment.[203] This consideration is particularly salient where, as here, the labor broker was working only for one company, and so it had no other income sources with which to pay its workers.[204]

d. Newway played an indirect role in Worker hiring and firing.

Newway's influence on the hiring and firing of Workers further demonstrates that Newway jointly employed the Workers as a matter of economic reality. Courts will consider "[t]he right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers" as a factor to consider in evaluating joint employment.[205] Although Soto Contreras formally hired the Workers on behalf of Baja, he did so at Newway's direction.

There is some dispute as to the manner in which Newway would communicate a need for additional workers. Machado testified that "Tom grant will communicate with Roberto Soto, you know, when he needs you know, guys."[206] Jonathan Parra Ponce stated that "[Machado] would tell

[200] *Barfield v. New York City Health and Hospitals Corp.,* at 144.
[201] Forler-Grant Deposition, page 18, line 16 to page 19, line 4, page 35, line 19 to page 36, line 5, referencing Deposition Exhibit 7; page 61, lines 1-7.
[202] *Id.*, page 64, lines 15-17.
[203] *Barfield*, 537 F.3d at 144-45.
[204] de Armas 30(b)(6) Deposition, page 89, lines 16-18.
[205] *Torres-Lopez*, 111 F.3d at 640.
[206] Machado Deposition, page 32, lines 4-15.

Ann Davison
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Roberto if he needed more workers or wanted to let someone go."[207] While Newway denied this,[208] it cannot be disputed that Newway unilaterally determined hiring needs. Throughout the relevant period, Newway would request workers to meet specific needs.[209] Grant would inform Soto Contreras how many laborers and cement finishers were needed on a given day.[210] Soto Contreras would offer to bring potential new hires to the worksite when Newway "wanted to use more people,"[211] and Newway could accept or reject these offers of additional labor.[212]

Worker Johnathan Parra Ponce said that "Tony [Machado] had the ability to hire and fire workers. He would tell Roberto if he needed more workers or wanted to let someone go."[213] Whether or not Newway had the authority to fire Workers, Newway exercised control over Worker qualifications. When a worker associated with one of Newway's contractors lacked the proper skill set, Newway would inform the worker's supervisor.[214] This indirect control over Worker hiring and firing increased Workers' economic dependence on Newway and as such, weighs in favor of joint employment.

e. Workers used Newway premises and equipment for their work.

The Workers' daily use of Newway premises and equipment also evinces joint employment because Newway's "investment in equipment and facilities is probative of the [W]orkers' economic dependence on the person who supplies the equipment or facilities."[215] Workers at 1120 Denny made daily use of Newway's physical office, where they would use a time clock supplied by Newway to

[207] Parra Ponce Declaration, ¶ 17.
[208] Forler-Grant Deposition, pate 87, lines 10-16.
[209] *Id.*, page 53, lines 4-12.
[210] *Id.*, page 24, lines 4-16.
[211] *Id.*, page 87, lines 5-9.
[212] *Id.*, page 87, line 21 to page 88, line 5.
[213] Parra Ponce Declaration, ¶ 17.
[214] Forler-Grant Deposition, page 88, line 23 to page 89, line 4, page 89, lines 13-16.
[215] *Torres-Lopez*, 111 F.3d at 640-41 (internal quotations omitted).

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clock in and out.[216] In addition, although Workers supplied their own tools, the large equipment they used for their day-to-day work belonged to Newway.[217]

What is unusual about the time clock is that it was implemented because Newway didn't trust Baja's representations about its workers onsite.[218] Instead of requiring Baja to improve its practices or risk contract termination, Newway took over this core supervision function itself. This development underscores both the control Newway exerted over individual workers and the intertwined nature of the two companies.

f. Workers' performed tasks analogous to "specialty jobs on the production line" that were integral to Newway's performance of its contractual duties, required no special skill, and provided no opportunities for profit or loss.

The nature of Workers' work also compels the conclusion that Newway jointly employed the Workers. Newway was a concrete high-rise subcontractor, and it was hired to handle the concrete components of high-rise construction at 1120 Denny Way, 707 Terry, and 2014 Fairview.[219] As one of Newway's subcontractors, Baja played the role of cement finisher, and its workers were responsible for tasks such as patching and sanding the concrete and building forms for pouring concrete.[220] Just as picking cucumbers "constituted one small step in the sequence of steps taken by [the putative joint employer] to grow the cucumbers and prepare them for processing at the cannery," in *Torres-Lopez*, Baja's tasks were part of a broader effort to perform concrete work for high-rise construction.[221] As such, Workers' responsibilities were akin to "specialty job[s] on the production line."[222]

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[216] Machado Deposition, page 133, lines 15-21.
[217] Forler-Grant Deposition, page 95, lines 17-20.
[218] *Id.*, page 37, line 4 to page 38, line 5, Referencing Deposition Exhibit 7, page 54, lines 14-25.
[219] *Id.*, page 90, line 24 to page 93, line 21.
[220] *Id.*, page 92, lines 2-18.
[221] *Torres-Lopez*, 111 F.3d at 643.
[222] *Id*. (quoting *Rutherford*, 331 U.S. at 730).

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By the same token, the "service [Workers] rendered [was] an integral part of [Newway's] business."[223] As the Ninth Circuit recognized in *Torres-Lopez*, "a line-job integral to the [the putative employer's] business is relevant because a worker who performs a routine task that is a normal and integral phase of the [putative employer's] production is likely to be dependent on the [putative employer's] overall production process."[224] Furthermore, the work Workers performed "require[d] no great initiative, judgment, or foresight, or special skill" and provided no "opportunity for profit or loss depending on [the Workers'] managerial skill."[225] Instead, Workers' financial well-being rested on the success of Newway's business.

g. Newway paid Baja at the same rate that it paid a former labor contractor.

The rate Newway agreed to pay Baja for its services is also probative of joint employment because it was the same rate that Newway had paid its previous subcontractor and was not subject to negotiation.[226] These undisputed facts suggest that the agreement was "standard for the industry,"[227] and that contractual responsibilities between Newway and its labor contractors "pass[ed] from one labor contractor to another without 'material changes.'"[228]

h. Baja worked exclusively for Newway.

The Workers "did not have a 'business organization that could or did shift as a unit from one [construction site] to another.'"[229] Instead, they worked exclusively for Newway[230] and at different

[223] Forler-Grant Deposition, page 92, line 23 to page 93, line 21.
[224] *Torres-Lopez*, 111 F.3d at 641 (internal quotation marks omitted).
[225] *Torres-Lopez*, 111 F.3d at 644 (internal quotations and citation omitted).
[226] Forler-Grant Deposition, page 50, line 20 to page 51, line 9; de Armas 30(b)(6) Deposition, page 84, line 24 to page 85, line 18.
[227] *Torres-Lopez*, 111 F.3d at 643.
[228] *Id.* at 640 (quoting *Rutherford*, 331 U.S. at 730).
[229] *Torres-Lopez*, 111 F.3d at 644 (quoting *Rutherford*, 331 U.S. at 730).
[230] de Armas 30(b)(6) Deposition, page 89, lines 16-18.

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times, were dispatched to different Newway locations.[231] In fact, the unrefuted evidence indicates that Baja Concrete USA was not a freestanding entity at all; it was both incorporated and registered in Washington for the purpose of providing labor to Newway.[232]

By the same token, Newway and Baja were by no means "completely disassociated,"[233] but rather, intimately intertwined. Machado, site superintendent for Newway, had a longstanding personal relationship with Carlos Ibarra, the brother of Baja president Claudia Penunuri.[234] The contract to employ Baja's workers was a verbal agreement between Newway and Ibarra.[235] It was Baja's first and only contract to supply workers in the U.S.[236] There were no written contracts between Baja and Newway.[237] Money flowed informally between Baja and Newway's Machado, with repeated loans and repayments, further belying an arms-length relationship between the two companies.[238]

i. Typical contractor-subcontractor relationships do not negate joint employment.

Appellants may argue that the relationship between Newway and Baja was typical for a contractor and subcontractor in the construction industry and therefore did not give rise to joint employment. Even if this assertion were correct as a factual matter, this argument is unpersuasive, and courts have rejected it under analogous circumstances. For example, in *Salinas v. Commercial Interiors, Inc.*, the Fourth Circuit observed, "That the general contractor-subcontractor relationship—

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[231] *Id.*, page 92, lines 4-19.
[232] *Id.*, page 20, lines 20-22, page 89, lines 4-22. *See Salinas v. Commercial Interiors, Inc*., 848 F.3d 125, 147 (2017) (finding joint employment where workers "worked almost exclusively on [putative joint employer's] jobsites").
[233] SMC 14.16.010. 14.19.010, 14.20.010
[234] Machado Deposition, page 122, line 25 to page 124, line 6; de Armas 30(b)(6) Deposition, page 144, lines 10-11, page 146, lines 5-15.
[235] Forler-Grant Deposition, page 27, line 17 to page 28, line 10, page 46, lines 15-24.
[236] de Armas 30(b)(6) Deposition, page 88, lines 9-17, page 89, lines 1-15.
[237] Forler-Grant Deposition, page 46, lines 18-24; de Armas 30(b)(6) Deposition, page 56, lines 21-22, page 85, lines 5-8.
[238] Machado Deposition, page 108, lien 15 to page 110, line 18, page 110, line 25 to page 111, line 24, page 112, line 24 to page 113, line 18, page 115, lines 3-6, page 118, line 10 to page 119, line 20, page 121, lines 3-16, de Armas 30(b)(6) Deposition, page 99, lines 4-7, page 101, lines 13-19, referencing Deposition Exhibit 7.

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or any other relationship—has long been 'recognized in the law' and remains prevalent in the relevant industry has no bearing on whether entities codetermine the essential terms and conditions of a worker's employment, and therefore, constitute joint employers for purposes of the FLSA."[239] Similarly, the Second Circuit has recognized that "the prevalence of an industry-wide custom is subject to conflicting inferences. While, on the hand, it may be unlikely that a prevalent action is a mere subterfuge to avoid complying with labor laws, on the other hand, the very prevalence of a custom may be attributable to widespread evasion of labor laws."[240]

2. As a matter of law, Baja Concrete USA jointly employed the workers.

Baja attempts to escape liability for Appellants' rampant violations of Seattle's labor standards by disavowing any role in the process beyond processing payroll and issuing paychecks. The Hearing Examiner should decline to permit this subterfuge. While Baja attempts to distance itself from Soto Contreras by portraying him as an independent contractor with an arms-length relationship to Baja, this fictional account does not stand up to reality. Instead, for all intents and purposes, Soto Contreras functioned as an extension of Baja.

Baja's 30(b)(6) representative testified that Soto Contreras "was hired to – to hire the workers, to do all the work for them,"[241] and she conceded that Soto Contreras' services benefited Baja.[242] Specifically, Soto Contreras performed a variety of services for Baja including hiring and onboarding Workers,[243] negotiating pay rates with Workers,[244] providing some degree of supervision (at the direction of Newway),[245] tracking working hours,[246] preparing invoices for Newway,[247] and providing

[239] *Salinas v. Commercial Interiors, Inc.,* 848 F.3d 125 at 144 (4th Cir. 2017).
[240] *Barfield v. N.Y.C. Health and Hosps. Corp.,* 537 F.3d 132 at 146 (2nd Cir. 2008) (internal quotation marks omitted).
[241] de Armas 30(b)(6) Deposition, page 118, lines 24-25.
[242] *Id.,* page 155, lines 18-21.
[243] de Armas 30(b)(6) Deposition, page 135, lines 12-14.
[244] *Id.*, page 54, lines 4-7.
[245] *Id.*, page 134, lines 10-19.
[246] *Id.*, page 34, line 9 to page 35, line 4, referencing Deposition Exhibit 2.
[247] *Id.*, page 25, line 17 to page 26, line 9.

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payroll information to Mercedes Accounting,[248] the entity that processed payroll for Baja. Soto Contreras would keep Baja informed as he carried out these duties,[249] further demonstrating that he was acting as Baja's agent. No supervisors from Baja with similar degrees of authority were present on the worksites,[250] so Baja completely relied on Soto Contreras to carry out these responsibilities. Baja paid for Soto Contreras' services,[251] notwithstanding its apparent efforts to obfuscate the arrangement by going through an intermediary.[252]

Furthermore, if Baja's attempt to pin responsibility on Soto Contreras were successful, savvy employers could reap the benefits of wage theft with impunity by simply contracting with a fly-by-night, judgment-proof labor broker. The Hearing Examiner should not tolerate—much less bless—this dangerous and exploitative practice. In this respect, the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA") is instructive by analogy. As the Eleventh Circuit explained,

> The AWPA's adoption of the FLSA definition of employment "was deliberate and done with the clear intent of adopting the 'joint employer' doctrine as a central foundation of this new statute; it is the indivisible hinge between certain important duties imposed for the protection of migrant and seasonal workers and those liable for any breach of these duties." H.R.Rep. No. 97–885, 97th Cong., 2d Sess. (1982) 6, *reprinted in* 1982 U.S.C.C.A.N. 4547, 4552 ("House Report"). Previous legislative efforts to protect farmworkers had focused on regulating the crew leaders who recruited, managed and paid the farmworkers. Those efforts, however, had failed to reverse the historical pattern of abuse of migrant and seasonal farmworkers, primarily because crew leaders were transient and often insolvent. Thus, in designing the AWPA, Congress took a completely new approach, making agricultural entities directly responsible for farmworkers who, as a matter of economic reality, depended upon them, even if the workers were hired or employed by a middleman or independent contractor. Although the AWPA places responsibilities on farm labor contractors as well as on agricultural employers, Congress' plain intent was to protect migrant and seasonal workers from abuse and exploitation, and to hold agricultural employers fully accountable as joint employers whenever the facts suggest that liability is fairly imposed.[253]

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[248] *Id.*, page 122, lines 8-18.
[249] *Id.*, page 145, lines 8-25.
[250] *Id.*, page 76, lines 6-10.
[251] *Id.*, page 111, line 12 to page 113, line 1.
[252] *Id.*
[253] *Antenor*, 88 F.3d at 930 (internal quotation marks and citations omitted).

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In any event, the undisputed evidence that the Workers were on Baja's payroll and received all paychecks from Baja renders Baja a joint employer under the "economic reality test."[254] And because Baja issued paystubs showing hours worked and amount earned, it knew—or at the very least, should have known—that the Workers were underpaid.[255] A tribunal "need not decide that every factor weighs against joint employment."[256] In fact, "[o]ne factor alone can serve as the basis for finding that two or more persons or entities are 'not completely disassociated' with respect to a worker's employment if the facts supporting that factor demonstrate that the person or entity has a substantial role in determining the essential terms and conditions of a worker's employment."[257]

3. As a matter of law, Antonio Machado jointly employed the workers.

Given the immense power he exerted over the conditions of Workers' employment, Machado independently functioned as a joint employer.[258] As noted, Machado was widely perceived as the "boss" on the construction site,[259] and he supervised the Newway foremen, who in turn supervised the Workers.[260] He directed Workers' day-to-day work by putting together weekly work schedules,[261] assigning tasks to his foremen to pass on to the Workers,[262] setting work hours,[263] and monitoring Workers' performance.[264] He also exerted control over the Workers by threatening them.[265]

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[254] *Becerra*, 181 F.2d at 197 (citing "[t]he power to determine the pay rates or the methods of payments to the workers" and "[p]reparation of payroll and the payment of wages" as evidence of joint employment).
[255] *Id*. at 198 (citing "whether the putative employer knew of the wage and hour violation" as a relevant consideration for joint employment).
[256] *Id.*, 194 (quoting *Zheng*, 355 F.3d at 77).
[257] *Salinas v. Commercial Interiors, Inc*., 848 F.3d 125, 142 (4th Cir. 2017).
[258] *Cf. Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1998) (recognizing that officers of a corporation can be liable for unpaid wages under a joint employment analysis under the FLSA).
[259] Parra Ponce Declaration, ¶ 14.
[260] Forler-Grant Deposition, page 79, lines 2-5, page 80, lines 2-6.
[261] Machado Deposition, page 21, line 21 to page 22, line 22.
[262] *Id.*, page 23, line 22 to page 24, line 1, page 42, pages 17-23.
[263] *Id.*, page 46, lines 13-19, page 54, lines 13-21.
[264] *Id.*, page 23, lines 2-16, page 25, lines 15-18, page 29, lines 9-11.
[265] Parra Ponce Declaration, ¶ 13.

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Machado was also enmeshed in the employment of the Workers insofar as he interacted with high-level Baja personnel and informally exchanged funds with Baja. As noted, Ibarra had a close personal relationship with Machado dating back several years before the relevant period.[266] Machado testified that he repeatedly loaned between $12,000.00 and $13,000.00 to Ibarra.[267] The loans were in the form of cash.[268] Machado was reimbursed for these alleged loans with money from Baja.[269]

D. The calculation of remedies is within the sound discretion of the Director, and remedies were reasonably assessed in this case.

Under the Paid Sick and Safe Time, Minimum Wage, and Wage Theft Ordinances, once liability is established "the remedies and penalties imposed by the Director shall be upheld unless it is shown that the Director abused discretion."[270] Under these Ordinances, "Remedies" include unpaid wages, liquidated damages, penalties, fines, and interest.[271] In Washington, administrative agency decisions that are committed to agency discretion are given great deference by courts. For a trial court or an appellate court to reverse a discretionary agency decision under review, it must find that the decision was manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.[272]

The Washington State Supreme Court explained, a "decision is manifestly unreasonable if the [decision maker], despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take."[273] The deference to agency discretion applies equally to the discretion to craft remedies – an agency's "determination as to remedies should be accorded

[266] Machado Deposition, page 123, line 9 to page 124, line 6; Forler-Grant Deposition, page 49, line 19-24.
[267] Machado Deposition, page 106, line 19 to page 109, line 2; page 109, line 13 to page 113, line 2.
[268] *Id*., page 113, lines 10-12.
[269] *Id*., page 114, lines 8-9, page 115, lines 4-6.; de Armas 30(b)(6) Deposition, page 99, line 4 to page 101, line 19.
[270] SMC 14.16.090.A; SMC 14.19.090.A; SMC 14.20.070.A.
[271] SMC 14.16.080, SMC 14.19.080; SMC 14.20.060.
[272] *ITT Rayonier, Inc. v. Dalman*, 67 Wn. App. 504, 510 (1992), *aff'd*, 122 Wn.2d 801 (1993) (citing *Hadley v. Department of Labor & Indus.*, 116 Wn.2d 897, 906 (1991), *Wilson v. Board of Governors*, 90 Wn.2d 649, 656 (1978), *cert. denied*, 440 U.S. 960 (1979)).
[273] *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 459 (2010) (citations and internal quotations marks omitted).

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considerable … deference."[274] In other words, "courts must not enter the allowable area of [agency] discretion" to craft remedies.[275] This is because "[t]he relation of remedy to policy is peculiarly a matter of administrative competence."[276]

The Director's assessment of wages and interest owed by Appellants is entirely reasonable, based upon the clear commands of the Ordinances and long-standing methods for determining wages owed. The assessed amounts cannot be said to be "untenable" or ones that "no reasonable person" would make. Because of the great deference owed to the Director's determination, there can be no dispute that the assessments here should be upheld.

1. The violations supported assessment of back wages, interest, liquidated damages, and civil penalties.

Under the Ordinances, where an employer is in violation, it "shall be liable for full payment of unpaid wages plus interest in favor of the aggrieved party … and other equitable relief."[277] Interest on these unpaid wages "accrue[s] from the date the unpaid wages were first due at 12 percent per annum."[278] Initial violations permit the Director to "assess liquidated damages in an additional amount of up to twice the unpaid wages."[279] The Director is also empowered to "assess a civil penalty of up to $500 per aggrieved party" for an employer's first violation.[280] These remedies, authorized by the Ordinances, must be upheld by this tribunal unless it is shown that the Director abused his discretion.[281]

By the plain terms of the Ordinances, OLS correctly calculated back wages for Appellants'

[274] *State ex rel. Washington Fed'n of State Emp., AFL-CIO v. Bd. of Trustees of Cent. Washington Univ.*, 93 Wn.2d 60, 69 (1980).
[275] *In re Case E–368*, 65 Wn.2d 22, 29 (1964).
[276] *Washington Fed'n of State Emp., AFL-CIO*, 93 Wn.2d at 69.
[277] SMC 14.16.080.B; SMC 14.19.080.B; SMC 14.20.060.B.
[278] *Id*.
[279] SMC 14.16.080.B; SMC 14.19.080.B; *see* SMC 14.20.060.B (permitting the same recovery of back wages, interest, and liquidated damages "for full payment of unpaid compensation").
[280] SMC 14.16.080.F; SMC 14.19.080.F; SMC 14.20.060.F.
[281] SMC 14.16.090.A; SMC 14.19.090.A; SMC 14.20.070.A.

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employees. Where workers received no paid sick and safe time, there are violations of the Ordinance and wages are due. Where overtime premium pay rates were absent, there are violations of the Ordinance, and wages corresponding to the difference are due. Where unauthorized deductions were taken out of workers' pay, the Ordinance is violated and wages corresponding to the deductions are due.[282]

2. The Director's calculation of wages owed is not an abuse of discretion.

As described in detail in Section B, 2., *supra*, the Director, through his designee, calculated wages owed pursuant to the Ordinances. All of OLS' calculations were designed to determine the wages workers should have been paid had Appellants not been operating in violation of the Ordinances where "wage" is defined as compensation due to an employee by reason of employment.[283] Because the Ordinances require the determination of the difference between the wages employees were paid and what they should have been paid, there can be no question that the calculations were appropriate and were not an abuse of discretion.

The methods used to calculate back wages are wholly consistent with the letter and the intent of the law and were not undertaken for any untenable purpose. Accordingly, the court must uphold the Director's remedies because he did not abuse his discretion.

3. The assessment of liquidated damages, penalties and fines are within the sound discretion of the Director and were reasonably assessed in this case.

Like the calculation of wages owed, the Ordinances provide discretion for the Director to set the amount of liquidated damages, penalties and fines.[284] Under the Paid Sick and Safe Time, Minimum Wage, and Wage Theft Ordinances, for first violations, the Director has the discretion to "assess liquidated damages in an additional amount of up to twice the unpaid wages."[285] The Director

[282] SMC 14.19.020.E.
[283] SMC 14.16.010; SMC 14.19.010.
[284] SMC 14.16.080, 14.16.090; SMC 14.19.080, 14.19.090; SMC 14.20.060, 14.20.070.
[285] SMC 14.16.080.B; SMC 14.19.080.B; SMC 14.20.060.B.

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also has the discretion to assess a civil penalty of $556.30[286] per affected employee for a first violation of the Ordinances.[287]

> In exercising that discretion, the Director considers:
>
> the total amount of unpaid compensation, liquidated damages, penalties, fines, and interest due; the nature and persistence of the violations; the extent of the respondent's culpability, the substantive or technical nature of the violations; the size, revenue, and human resources capacity of the respondent; the circumstances of each situation; the amounts of penalties in similar situations; and other factors pursuant to rules issued by the Director.[288]

The setting of liquidated damages, penalties, and fines is committed to the sound discretion of the Director, and therefore is owed considerable deference.[289] For the non-wage portion of the Determination, the areas subject to OLS discretion are the liquidated damages assessment of up to two times the amount of wages owed and the per-employee penalties of $556.30 for violations of either Ordinance.

In this case, the Director, through his designee, considered the required factors and set an amount of liquidated damages and penalties within the range provided by ordinance.[290] This tribunal need only find that the Director considered the identified factor; it need not determine if the conclusions drawn from that consideration represent the "best" decision.[291] Accordingly, the Director properly exercised his discretion, and the assessed amounts must be upheld.[292]

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[286] Seattle City Clerk File No. 322130, Office of Labor Standards (OLS) 2022 Annual Increases to Seattle Minimum Wage and Labor Standards Penalties, Fines, filed October 8, 2021.

[287] SMC 14.16.080.F; SMC 14.19.080.F; SMC 14.20.060.F.

[288] SMC 14.16.080.A.3; SMC 14.19.080.A.3, 14.20.060.A.3.

[289] *Washington Fed'n of State Emp.*, 93 Wn.2d at 69.

[290] Keppinger Declaration, ¶¶ 25-30.

[291] *See Hadley v. Dep't of Labor & Indus.*, 116 Wn.2d 897, 902–03 (1991), *amended*, 814 P.2d 666 (Wash. 1991) (under a law giving an administrative agency discretion to compromise the amount of a lien and provided that the agency "shall consider" certain factors, "[t]he proper question for review therefore is whether the Department considered the statutory factors" not a review of the contents of that consideration); *see also Nw. Nat. Gas Co. v. Clark Cty.*, 98 Wn.2d 739, 743 (1983), *abrogated on other grounds by Weyerhaeuser Co. v. Easter*, 126 Wn.2d 370 (1995) (where statute directed that an administrative agency "shall consider" certain factors in setting the value of a gas system for taxation, testimony that the agency did consider those factors sufficed to comply with that requirement).

[292] *Shanlian v. Faulk*, 68 Wn. App. 320, 328 (1992) (finding that orders to pay money within a range set by statute were within the discretion of an agency imposing those penalties and recognizing that courts should not intrude on that discretion).

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IV. CONCLUSION

The undisputed facts conclusively establish that the Workers were not properly compensated for their labor between February 2018 and August 2020. The Director properly determined the remedy for these violations by adhering to the relevant statutory requirements and appropriately exercising his discretion. The undisputed facts further establish that, as a matter of economic reality, Appellants jointly employed the Workers, and consequently, that they are jointly and severally liable for the violations of Seattle's labor standards that occurred within the relevant time period. The Hearing Examiner should uphold the Determination in its entirety.

DATED this 1st day of July, 2022.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that, on this date, I caused to be served true and correct copies of the foregoing documents:

1. **Respondent's City of Seattle's Motion for Summary Judgment;**
2. **Declaration of Cindi Williams in Support of Respondent City of Seattle's Motion for Summary Judgment;**
3. **Declaration of Labor Standards Enforcement Manager Katie Jo Keppinger;**
4. **Declaration of Labor Standards Investigator Daron Williams;**
5. **Declaration of Lorna S. Sylvester in Support of Respondent City of Seattle's Motion for Summary Judgment; and**
6. **Declaration of Laura Hurley**

on the parties listed below and in the manner indicated:

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the foregoing being the last known addresses and email addresses of the above-named party representatives.

Dated this 1st day of July, 2022, at Seattle, Washington.

/s/ Sheala Anderson
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